(H)

No. 94-947

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

NATIONAL LABOR RELATIONS BOARD,

Petitioner

v.

TOWN & COUNTRY ELECTRIC, INC.

and

AMERISTAFF PERSONNEL CONTRACTORS, LTD.

Respondents

On Writ of Certiorari to the
United States Court of Appeals for
the Eighth Circuit

BRIEF OF AMICUS CURIAE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO, CFL, IN SUPPORT OF PETITIONER

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STATUTORY PROVISIONS

29 U.S.C. §151: The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channel of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial

strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have cccurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

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I. INTEREST OF AMICUS CURIAE

The International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO, CFL ("Boilermakers"), submits this brief, as *amicus curiae*, in support of the Petitioner, National Labor Relations Board ("NLRB"). All parties have given written consent for the Boilermakers to appear as *amicus curiae* in this matter.

The issue before this Court is whether a paid union organizer, applying for or holding a job with an employer he intends to organize, is an "employee" within the meaning of §2(3) of the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. §152(3), and therefore protected from discrimination because of his union activity or affiliation. While this is an issue of vital importance to all of organized labor, the Boilermakers International has a particular interest in this question, distinct from that of the other parties to this litigation, because of its organizing program.

The Boilermakers, with a membership of approximately 80,000, represent employees in a variety of industries, including construction, shipbuilding, cement, forging, mining and manufacturing. The Boilermakers International employs a twenty-two person staff assigned to organize employees in all industries falling within its craft jurisdiction. These organizers often attempt to join the work force of the employers they intend to organize.

For the past fifteen years, the Boilermakers International has been engaged in a program, known as "Fight Back," to organize workers in the construction

industry. The Boilermakers have filed a number of election petitions seeking to represent employees in the construction industry. *See, e.g., Foster Wheeler Constructors, Inc.*, 4-RC-17073; *McDermott International, et al.*, 15-RC-7606; *Process Mechanical, Inc.*, 1-RC-19275; *Qualified Personnel, Inc.*, 5-RC-12901; *Advance Tank, Inc.*, 10-RC-13360; *Harbert, Inc.*, 12-RC-7200; *The Industrial Company*, 18-RC-15368; *U.S. Boiler & Tube Co., Inc./U.S.B.T. Abrasives & Refractories*, 10-RC-14310; *Foster Wheeler Constructors, Inc.*, 11-RC-5939.

The Boilermakers International has filed unfair labor practice charges with the NLRB where an employer's response to organizing efforts has been to unlawfully discriminate against applicants or current employees. *See, e.g., H.B. Zachry Co.*, 289 N.L.R.B. 838 (1988), *enforcement denied*, 886 F.2d 70 (4th Cir. 1989); *Fluor Daniel, Inc.*, 304 N.L.R.B. 970 (1991), *enforced mem.*, 976 F.2d 744, *reh'g denied*, 980 F.2d 1449 (11th Cir. 1992); *Sunland Construction Co., Inc.*, 309 N.L.R.B. 1224 (1992); *Ultrasystems Western Constructors, Inc.*, 310 N.L.R.B. 545 (1993), *enforced in part, remanded in part*, 18 F.3d 251 (4th Cir. 1994); *Sunland Construction Co., Inc.*, 311 N.L.R.B. 685 (1993); *Fluor Daniel, Inc.*, 311 N.L.R.B. 498 (1993). Four of these decisions involve the protection to be accorded paid organizers. In *H.B. Zachry Co. v. NLRB*, 886 F.2d 70 (4th Cir. 1989), the United States Court of Appeals for the Fourth Circuit, in disagreement with the NLRB, ruled that paid organizers are not "employees," entitled to the protection of the Act. The Fourth Circuit's decision in *Zachry* is cited by the Eighth Circuit as support for its decision in the instant case. *Town & Country Electric, Inc. v. NLRB*, 34 F.3d 625, 628 (8th Cir. 1994). The Fourth Circuit declined to reverse *Zachry* in *Ultrasystems Western Constructors, Inc. v. NLRB*, 18 F.3d 251 (4th Cir. 1994). Both *Zachry* and *Ultrasystems* involved paid organizers from the Boilermakers.

The two cited Sunland Construction Company cases were companion cases with *Town & Country* before the NLRB, and the Boilermakers participated in the oral argument before the NLRB concerning this issue. The decision in *Sunland Construction Co., Inc.*, 309 N.L.R.B. 1224 (1992) was issued at the same time as the NLRB's decision in this case.[1]

The Boilermakers' Fight Back program shares some similarities with the organizing efforts portrayed in this case. As noted above, the Boilermakers utilize paid staff organizers. Like the International Brotherhood of Electrical Workers ("IBEW"), the Boilermakers involve rank-and-file union members by encouraging them to accept work with nonunion contractors and asking those members to assist, within the confines of the law, in the organizing process.

There are also significant differences between Fight Back and the IBEW efforts. Only Boilermakers' staff organizers receive compensation for their efforts. The

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[1]While each party sought review of the NLRB's decision, the Boilermakers and Sunland subsequently entered into a settlement agreement whereby Sunland extended voluntary recognition to the Boilermakers. The parties further entered into three collective bargaining agreements under which Sunland is currently performing work. *See Sunland Signs Union Contracts, Boilermakers Drop ULP Charges*, Daily Labor Report, Sept. 20, 1994, at A-6.

Boilermakers do not make up the difference between union scale and non-union wages for those rank and file members who agree to work for nonunion contractors. *Compare Town & Country v. NLRB*, 34 F.3d at 629 *with Sunland Construction Co., Inc.*, 311 N.L.R.B. 685, 689-94, 697-98, 700-03 (1993). Hence, those union members who agree to assist the Boilermakers in organizing do so strictly as volunteers. In addition, the Boilermakers do not utilize any type of "salting resolution." *Compare Town & Country with Sunland.*

II. SUMMARY OF ARGUMENT

The Board has consistently interpreted §2(3) to include paid organizers. *Town & Country*, 309 N.L.R.B. 1250, 1255, n.25 (1992). The Eighth Circuit's rejection of the Board's interpretation flies in the face of the clear statutory language of §2(3), the legislative history of the Act, as well as settled principles of statutory interpretation and deference to agency expertise. The Boilermakers anticipate that these matters will be covered in some detail in the principal briefs submitted to the Court. The focus of the Boilermakers' argument is on the major policy reasons why the Court should reject the Eighth Circuit's analysis and find paid organizers to be protected employees under the Act.

The Eighth Circuit's decision fundamentally rests on a motive-based analysis of who is an "employee" deserving of protection under the Act. According to the lower court, paid organizers are entitled to no sanctuary under the Act, even though they engage in the same concerted activity as volunteer organizers. This artificial distinction lacks any basis in either the

language or purpose of the NLRA, which protects organizing activities without regard to motive. The uncertainties created by such a motive-based analysis would be impermissibly destructive of concerted activity sanctioned by the Act. The decision also rests on the improper assumption that employees engaging in organizing activity are "disloyal" to their employers and are, therefore, unprotected. The decision further improperly attempts to invoke the common law of master-servant to find paid organizers outside the statutory definition of protected employees and, even then, misconstrues that common law.

III. THE EIGHTH CIRCUIT'S ANALYSIS INCORRECTLY RESTS ON THE MOTIVE UNDERLYING THE ORGANIZER'S ACTIVITY

The NLRA extends protection to the overt act of organizing. The Eighth Circuit's analysis undermines this protection by improperly delving into the motives underlying the paid organizer's activity.[2] As will be shown, a motive-based test for protecting concerted activity would effectively destroy that statutory shield. To appreciate the fallacy and the danger of this approach it is important to recall the Congressional purpose behind enactment of the statute.

In adopting the Act sixty years ago, Congress chose to protect the rights of

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[2]As shall be seen, without any evidence, the Eighth Circuit speculates as to various nefarious motives supposedly held by the discriminatees in this case, as well as paid organizers in general. These matters are addressed *infra.*, at pp. 23-24. The focus here is the theoretical underpinnings of the lower court's decision.

working people to engage in "concerted activities," including organizing and collective bargaining, as a means of providing them at least some measure of economic leverage in dealing with their employers. 29 U.S.C. §157; *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (unions are "essential to give laborers opportunity to deal on an equality with their employer"). Congress recognized that workers and, in turn, the country as a whole would benefit from legislation fostering decent wage rates, establishment of pension and other fringe benefits, and humane working conditions. 29 U.S.C. §151. *See also Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 182 (1941) ("Protection of the workers' right to self-organization does not curtail the appropriate sphere of managerial freedom; it furthers the wholesome conduct of business enterprise."). This broad public policy undergirds many of the social reform measures passed in the wake of the Great Depression. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. §201 *et seq.*, finding regulation of minimum wage, overtime and child labor necessary to correct "labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency, and general well-being of workers. . . ."; Social Security Act, 42 U.S.C. §301, *et seq.*, as discussed in *Mathews v. De Castro*, 429 U.S. 181, 185-87 (1976).

Legislative protection for organizing and collective bargaining was aimed specifically at assisting workers in achieving some of these ends through their own efforts in an economy ever more dominated by powerful and often oligarchical corporate employers. Indeed, this is explicitly recited as a Congressional finding justifying passage of the NLRA. 29 U.S.C. §151. More recently,

Congress affirmed its view that protection of organizing and collective bargaining remains an efficacious antidote for the social ills of disproportionately low wages, poor working conditions and labor unrest by extending NLRA coverage to not-for-profit hospitals. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 497-98 (1978) ("Congress determined that the extension of organizational and collective-bargaining rights would ameliorate these conditions and elevate the standard of patient care.").

As the Board stated in this case, "[t]he right to organize is at the core of the purpose for which the statute was enacted." *Town & Country*, 309 N.L.R.B. at 1256. *See American Hospital Ass'n v. NLRB*, 499 U.S. 606, 609 (1991) ("[t]he central purpose of the Act was to protect and facilitate employees' opportunity to organize unions to represent them in collective bargaining negotiations"); *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 206 n.42 (1978) ("the right to organize is at the very core of the purpose for which the [Act] was enacted"); *Phelps Dodge Corp.*, 313 U.S. at 194.

In the NLRA, Congress chose to shield the workers' right to organize both with affirmative protections afforded those engaging in such activity, *see*, 29 U.S.C. § 157, and with negative prohibitions on employers requiring they refrain from discriminating against anyone who would so act, *see* 29 U.S.C. §158(a)(3). A refusal to hire based upon an employee's organizing activity violates §8(a)(3). *Fluor Daniel, Inc.*, 304 N.L.R.B. 970 (1991), *enforced mem.*, 976 F.2d 744, *reh'g denied*, 980 F.2d 1449 (11th Cir. 1992). This is true whether an individual's organizing activities have been

directed at fellow employees or at workers employed by other employers. *Compare Fluor Daniel, Inc.*, 304 N.L.R.B. 970 (1991), *enforced mem.*, 976 F.2d 744 *reh'g denied*, 980 F.2d 1449 (11th Cir. 1992) *with Prince Lithograph Co., Inc.*, 171 N.L.R.B. 1385 (1968), *enforced*, 405 F.2d 175 (4th Cir. 1969). Current employees are protected from discharge when they engage in organizing activities. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Ciro Resorts, Inc.*, 244 N.L.R.B. 880 (1979), *enforced*, 646 F.2d 403 (9th Cir. 1981). Applicants may not be rejected nor current employees treated differently on the ground that they are likely to be union supporters. *Scherrer & Davisson Logging Co.*, 108 N.L.R.B. 357 (1954), *enforced* 221 F.2d 802 (9th Cir. 1955); *Lipsey, Inc.*, 172 N.L.R.B. 1535 (1968); *National Fabricators, Inc.*, 295 N.L.R.B. 1095 (1989), *enforced*, 903 F.2d 396 (5th Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991)(selection of union members for layoff because they would be more likely to honor a picket line is "inherently destructive" of employee rights). The legislative focal point bore on shielding overt actions, defined to include organizing, collective bargaining, and other concerted activity, without regard for the actor's subjective reasons for engaging in that conduct. Neither the NLRA as passed in its original form in 1935 nor as amended by the Taft-Hartley Act in 1947 circumscribed or denied these protections based on a person's motivation for undertaking otherwise lawful concerted activity.

Yet, this is precisely the basis upon which the Eighth and Fourth Circuits find paid organizers to be unprotected under the Act. Both the Eighth and the Fourth Circuits hold that nonunion employers can, with

impunity, reject job applications from self-acknowledged organizers who receive some measure of financial support from their unions and who would, if hired, engage in organizing activity of the type protected under the Act. *Town & Country Elec., Inc. v. NLRB*, 34 F.3d at 628-29; *H.B. Zachry Co. v. NLRB*, 886 F.2d at 75-76. At the same time, those lower courts grudgingly acknowledge that a person undertaking exactly the same organizing activities would be fully protected, so long as he receives no financial support from a union. *Town & Country*, 34 F.3d at 629; *H.B. Zachry*, 886 F.2d at 75.

In this case, two full-time paid organizers applied to and, had jobs been offered, would have gone to work for Town & Country. Nothing in the evidence suggests they would have performed the work assigned them by Town & County in anything other than a competent, professional manner. The record is clear that they would have been expected to devote much of their nonwork time to lawful organizing efforts among Town & Country's other employees. *Town & Country*, 309 N.L.R.B. at 1251, 1256. Presumably, they would have returned to their organizing positions with the union at the conclusion of the project.[3]

In addition to these two union officials, several rank-and-file IBEW members applied for work with Town & Country. All were

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[3]Town & Country is a nonunion construction contractor. Because most construction jobs are of short duration, workers in this industry typically face sporadic employment with multiple employers. *John Deklewa & Sons*, 282 N.L.R.B. 1375, 1380 (1987), *enforced*, 843 F.2d 770 (3d Cir.), *cert. denied*, 488 U.S. 889 (1988).

ready, willing and qualified to fill the openings available. *Town & Country*, 309 N.L.R.B. at 1262-63. These applicants would have received the difference between union-scale wages and Town & Country's nonunion wages from the union had they been hired. In turn, they were expected to undertake lawful organizing during their nonwork time. *Town & Country*, 309 N.L.R.B. at 1251. Malcolm Hansen, the only such applicant hired, was promptly discharged after he began organizing efforts.

The Eighth Circuit held that none of these persons was an "employee" entitled to sanctuary under the NLRA. *Town & Country*, 34 F.3d at 629. In a nutshell, the lower court reasoned that "the organizers wanted to enter Town & Country's work force not for financial gain, but to organize its workers" and this distinguished them from "typical applicants" for purposes of the Act. *Id.* at 628-29. *See also H.B. Zachry Co.*, 886 F.2d at 74 ("[union organizer] Edwards' interest in applying to Zachry for employment was qualitatively different from that of a bona fide applicant").[4] The Eighth Circuit suggests the paid organizers and the applicants who would have had their wages subsidized if hired failed to qualify as "employees" because they would have increased their organizing efforts or even quit if the union told them to do so. *Town & Country*, 34 F.3d at 629 (an employer "should not be required to place and retain on its payroll those whose continued presence

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[4]Both Courts acknowledge, *Town & Country*, 34 F.3d at 627; *H.B. Zachry*, 886 F.2d at 72, that job applicants are considered "employees" within the meaning of §2(3). *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941).

on the job will be determined by an entity other than itself").

This reliance on motivation is a legally and logically unsatisfying justification for the court's result. The persons working for Town & Country were at-will employees, meaning they could be fired at any time and for any reason other than a legally forbidden one.[5] By the same token, an at-will employee can quit whenever he chooses and for whatever reason strikes his fancy. *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 627 (Minn. 1983) (In an at-will situation, "the employer can summarily dismiss the employee for any reason or no reason, and . . . the employee . . . is under no obligation to remain on the job."); *Randall v. Northern Milk Prods.*, 519 N.W.2d 456, 459-60 (Minn. Ct. App. 1994).[6]

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[5]That is, the Company had the prerogative to terminate for a sound reason (an employee's demonstrated incompetence), an irrational reason (an employee's decision to wear purple laces in his work boots), or no reason whatsoever. Even in an at-will situation, however, an employer cannot terminate for legally prohibited reasons such as race, gender or engaging in concerted protected activity.

[6]Minnesota law would have governed, since the job interviews, the hiring and the work itself were conducted in that State. *Town & Country*, 309 N.L.R.B. at 1250-52. The at-will employment precepts that an employer or an employee may terminate the relationship at any time for any lawful reason are universal and, indeed, define the doctrine. *See Novasel v. Nationwide Ins. Co.*, 721 F.2d 894, 896 & n.2 (3d Cir. 1983); Blade, *Employment at Will v. Individual Freedom*, 67 Colum. L. Rev. 1404, 1419-20 (1967); *see also Mares v. Conagra Poultry Co.*, Inc. 971 F.2d 492-95 (10th Cir. 1992)(Colorado law); *Arledge v. Stratmar Systems, Inc.*, 948 F.2d

Thus, a worker may lawfully depart an at-will employer because a union tells him to or because his spouse is transferred to a job in another state or because his church requires he undertake a religious mission.[7]

If a company wants the benefits of an at-will relationship with its workers, it must accept the burdens as well. The company's remedy against sudden employee departures rests in employment contracts for a specific term, whether the term reflects a given time period or completion of a particular job. That a business decides to operate as an at-will employer is hardly a reason for depriving members of its work force of the Act's protections, where those employees would be at liberty to quit without notice for any reason including the influence of third parties.

845, 847-48 (2d Cir. 1991)(New York law); *LaScola v. US Sprint*, 946 F.2d 559, 563 (7th Cir. 1991)(Illinois law); *Zimmerman v. H.E. Butt Grocery Co.*, 932 F.2d 469, 471 (5th Cir.), *cert. denied*, 502 U.S. 984 (1991)(Texas law); *Broussard v. CACI, Inc.-Federal*, 780 F.2d 162, 163 (1st Cir. 1986)(Maine law).

[7]For example, members of the Church of Jesus Christ of Latter Day Saints are expected to undertake extended religious missions, often lasting a year or more, as an integral part of their faith. *See Leader of Mormons Reaffirms Primary Church Teachings*, Los Angeles Times, Oct. 24, 1994, Sec. B, p. 4. Would a Town & Country worker subject to this religious call no longer be considered an "employee" under the Act? If so, he would be without protection not only for any concerted activity, but also for filing a charge or even giving evidence to the NLRB. *See* 29 U.S.C. § 158(a)(4).

In considering the Eighth Circuit's notion that the union's "direction" renders paid organizers unprotected, it is important to keep in mind both the nature of the direction supplied by the union and the jobs for which the organizers applied. The organizers sought work as electricians -- not as corporate decision makers or confidential employees with access to trade secrets, financial data or other proprietary information. The evidence establishes that the union essentially told them to do the work assigned them and, during nonwork hours, actively promote the IBEW to other employees. The former is what Town & Country would expect of any employee, and the latter is what Congress has declared must be permitted as a matter of law. *Republic Aviation*, 324 U.S. at 802-05 (union solicitation by employees on the employer's property during nonworking hours protected under the Act).

At bottom, the Eighth Circuit's decision rests on the determination that a worker does not enjoy the protections of the Act because a union has told him to engage in concerted activity and will financially subsidize him for doing so. The decision creates a legal distinction between paid organizers, on the one hand, and unpaid organizers or volunteers, on the other, based on nothing more than their reasons for pursuing precisely the same activities. According to this thesis, the former presumably act because they have been paid to do so and the latter because they wish to improve their working conditions.[8]

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[8]Doubtless, this characterization unfairly denigrates the motives of many union organizers who act, not out of a mercenary interest in a paycheck, but out of a fundamental belief in the

Whatever the accuracy of these somewhat dubious presumptions, the lines they draw for purposes of bounding the protections of the NLRA are neither invited by nor countenanced in the statutory language. This Court should reverse and recognize that the protections of the Act extend to paid organizers seeking employment with or working for nonunion employers so long as they pursue lawful concerted activity. Congress long ago determined concerted organizing activity to be in the public interest and, hence, deserving of protection. Neither the public interest served nor the protection afforded varies with the reasons a person chooses to engage in that activity.

This artificial distinction, based on the perceived motivations of the actors rather than their actual conduct, ultimately leads to bizarre or unprincipled outcomes and would gut the essential purpose of the Act.

For example, a longtime employee in a nonunion fish canning factory may meet with other employees during their lunch break to discuss seeking union representation through an election petition. This particular employee hopes to achieve higher wages and a better health care plan through collective bargaining. His efforts represent quintessential protected activity under the Act. Suppose, however, he is joined in this lunch meeting by the following: a worker who attends college part-time and who has been told by one of his professors that an organizing drive would make a terrific topic for a term paper; a worker who believes unionizing would be a way of getting back at his supervisor from whom he dislikes taking

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principles of unionism.

orders because she is female; and a worker who anticipates unionization will lead directly to the formation of a company-sponsored softball team. Of these three, it might be said the first has a rational, if wholly irrelevant motive for his actions; the second has a malevolent motive; and the third has a motive that can be charitably characterized as goofy. As the NLRA generally has been construed, all three would be protected in their concerted activity and could not be terminated or otherwise subjected to discriminatory treatment because of those efforts. *See Ohio Valley Graphic Arts, Inc.*, 234 N.L.R.B. 493 & n.4 (1978) ("[e]mployees act for a multitude of reasons in seeking representation and such actions are protected without regard to the individual's motivation"); *Youny Hinkle Corp.*, 244 N.L.R.B. 264, 266 (1979); *Johnnie Johnson Tire Co.*, 271 N.L.R.B. 293, 294 (1984), *enforced mem.* 767 F.2d 916 (5th Cir. 1985)(degree of merit or lack of merit of particular grievance does not affect protected nature of employee concerted activity); *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962)(reasonableness of method of protest adopted by employees does not decide protected nature of concerted activity).

This, however, would not necessarily be true were the *Town & Country* rationale accepted as a proper reading of the NLRA. If this Court sanctions the motive-based analysis initiated in *Town & Country* and *Zachry*, workers seldom, if ever, could undertake concerted activity with any real assurance they would be protected. That determination would hinge on their motives or subjective reasons for acting. Unfair labor practice hearings would become fact-finding quagmires in which employers could endlessly

challenge the motives of those engaging in organizing.

Just how would administrative law judges, the Board and ultimately the courts decide which motives are "good" and, hence, confer protection on concerted activity and which are "bad" and, therefore, fail to do so? Should the person entertaining a seemingly frivolous goal of bargaining for a bunch of softball uniforms, bats and balls fall outside the protection of the Act? Presumably not, since Congress did not mandate that employees seek only certain specified financial objectives through their concerted activities. Ought the worker disgruntled with his female supervisor be protected in his organizing, even though his motive is spiteful and ugly? Is the college student with a purely academic interest and who acts solely at the direction of his professor more or less deserving of protection? This says nothing about the mixed-motive situation in which the actor holds both a conventional reason, e.g., better working conditions, and a less orthodox one, e.g., a top grade in a labor relations class.

Broad application of the *Town & Country* rationale would have an extraordinarily deleterious impact on concerted activity. A given worker could lose all protections of the NLRA if his motives for engaging in otherwise lawful concerted activity were *post facto* judicially deemed unworthy.

This would not only have a strong deterrent effect on individual employees, but would breed an even more insidious result infecting the very core of unionism -- joint or united action for a common good. Settled interpretation of the NLRA holds that an

"employee" cannot engage in protected concerted activity by acting alone or with nonemployees. *See, e.g., Prill v. NLRB*, 835 F.2d 1481, 1485 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988); *NLRB v. Texas Natural Gasoline Corp.*, 253 F.2d 322, 325 (5th Cir. 1958)(no concerted activity where one current and one terminated employee jointly protested latter's dismissal). Under the *Town & Country* rationale, a worker organizing based on a so-called suspect motive -- such as pay from a union -- would fall outside the definition of an "employee" for purposes of the Act. In turn, a fellow worker, whose motive is beyond question, would not be engaged in protected concerted activity were he to act with the first worker. Neither would enjoy the NLRA's protection, and both would face immediate termination without legal recourse.

Acceptance of the Eighth Circuit's view would require anyone contemplating concerted activity to assess the motives of his or her fellow actors and guess whether those motives later would be recognized as judicially acceptable, thus affording shelter under the Act against an employer's workplace retaliation. Purity of deed would no longer be enough; purity of heart would become the touchstone. It is hard to imagine a judicial doctrine having a greater adverse impact on concerted activity or being more destructive of the purposes of the NLRA in shielding a worker's right to organize free from harassment and discrimination. Just as this Court held that excluding job applicants from the Act's definition of employees "inevitably operates against the whole idea of the legitimacy of organization. . . . [and] undermines the principle which, as we have seen, is recognized as basic to the attainment of industrial peace," *Phelps Dodge*

Corp., 313 U.S. at 185, excluding workers based on their motives for organizing would be at least as pernicious.

These untoward results are even more pronounced in considering how the *Town & Country* rationale would be applied in the case of an employee of a nonunion company who becomes a paid union organizer sometime after he is hired. *See Willmar Elec. Service, Inc. v. NLRB*, 968 F.2d 1327, 1329 (D.C. Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 1252 (1993)(refusal to hire a paid union organizer is "legally indistinguishable" from firing a company employee who "has just established similar ties to a union"). Based on the Eighth Circuit's treatment of Hansen, it follows that an employee of a nonunion company who receives some sort of financial assistance from a union to pursue organizing activity ceases to be a protected "employee." As a result, he may be terminated for engaging in concerted activity or even for filing a NLRB charge or giving testimony in connection with someone else's charge. Moreover, another employee would be protected if the two engage in concerted activity before the first employee becomes a paid organizer, but not after.

Trying to determine the degree of union financial support necessary to convert an otherwise protected employee into an unprotected *Town & Country* employee would hopelessly compound the analysis. In other words, just how big a stipend would be required to create economic dependence on the union or whatever rather chimerical danger underlies the *Town & County* decision? Does the answer depend on the extent to which the employee relies on the stipend to meet his family's basic living expenses? Is accepting money from the union only to print handbills

or reimburse out-of-pocket expenses sufficient? Here, again, an employee would be unable to decide with any equanimity whether he or his colleagues might fall on the far side of the *Town & Country* line and lose their protection under the Act.

The *Town & Country* decision also raises troubling questions if applied to an employer that is already unionized. Typically, union officers continue working for the employer but receive some compensation from the labor organization for the performance of their union duties. *See Sunland Construction Co., Inc.*, 311 N.L.R.B. 685, n.5. These duties necessarily entail traditional concerted activity, such as processing grievances or contacting new employees about becoming union members. The *Town & Country* rationale certainly suggests these union officials may cease to be "employees" and, therefore, stand beyond the umbrella of the Act.

As these examples illustrate, *Town & Country* is at war with the public policies Congress cited as justifying the NLRA and would do violence to that carefully ordered scheme balancing the interests of labor, management and the citizenry as a whole. Those policies are far better served by keeping motive or status as a paid organizer altogether removed from any equation used to determine who should be protected under the Act.

Since the Act's treatment of job applicants is no different than that of persons already employed, an applicant's motivation or reason for wanting to engage in concerted activity, if hired, is of no legal consequence. An employer cannot, consistent with the protections of 29 U.S.C. §§157 and 158(a)(3), discriminate based on those

motives. Just as a nonunion employer could not refuse to hire a person who announces an intention to organize the company because he believes four-square in the principles of unionism, *Fluor Daniel, Inc.*, 304 N.L.R.B. 970 (1991), *enforced mem.*, 976 F.2d 744, *reh'g denied*, 980 F.2d 1449 (11th Cir. 1992), that employer should not be allowed to reject an applicant who intends to do just the same because he is a paid union organizer.

IV. THE EIGHTH CIRCUIT'S DECISION IMPROPERLY EQUATES ORGANIZING WITH UNPROTECTED "DISLOYALTY"

Lurking barely beneath the surface of *Town & Country* and *H.B. Zachry Co.* is the notion that an applicant bent on organizing a nonunion employer at the behest of a labor organization is somehow "disloyal" to that employer. *Town & Country*, 34 F.3d at 628. ("were this a case involving a typical job applicant, we might well agree that an employee may be simultaneously loyal to his union and to his nonunion employer."); *H.B. Zachry Co.*, 886 F.2d at 74 (remarking on the supposed "adversariness between employers and unions"); *see also Willmar Elec. Service, Inc. v. NLRB*, 968 F.2d at 1330. In embracing this "disloyalty" claim, the lower courts appear to have disregarded the congressional determinations protecting concerted activity and collective bargaining and have, instead, substituted their own anti-union predilections and a strong distaste for one specific organizing technique.

The Board and the courts have never held that an employer may equate either a desire to organize a union or an association with a union as evidence of "disloyalty." *See Lipsey*, 172 N.L.R.B. at 1535; *National Fabricators, Inc.*, 903 F.2d at 399; *Texaco,*

Inc. v. NLRB, 462 F.2d 812, 814 (3d Cir. 1972), *cert. denied*, 409 U.S. 1008 (1972) (participation in protected concerted activity may not be treated as "disloyal" by employer); *Misericordia Hospital Medical Center v. NLRB*, 623 F.2d 808, 810-12 (2d Cir. 1980); *Southwire Co. v. NLRB*, 820 F.2d 453, 462-63 (D.C. Cir. 1987); *Peavey Co. v. NLRB*, 648 F.2d 460, 462 (7th Cir. 1981). The Board and the courts have dealt with the issue of loyalty in a number of different contexts. The Act clearly does not bar an employer from discharging an employee who engages in a "disloyal" act in the sense that the employee harms the employer's business. *See NLRB v. Local 1229, IBEW*, 346 U.S. 464 (1953) (upholding discharge for disparagement of employer's product).

Given the explicit congressional recognition that concerted activity serves the public interest and requires protection, neither paid organizers nor union-minded volunteers can be legitimately branded as disloyal for engaging in such conduct. The sort of "loyalty" the Eighth Circuit apparently finds acceptable would demand that a worker be willing to toil for substandard wages and benefits, while eschewing lawful means of attempting to improve his or her economic lot through organizing and collective bargaining. According to the Eighth Circuit, those efforts -- notwithstanding their legal sanction -- amount to little more than industrial treason, especially if they are aided and abetted by paid union organizers. This philosophy simply cannot be reconciled with the statement of public policy found in the NLRA. *See* 29 U.S.C. §151. *Accord NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 22-23. It ought not, therefore, play any part in a judicial decision construing the NLRA.

In deciding cases, federal judges should not act as architects of public policy, especially when Congress, as with the NLRA, has already drawn detailed blueprints. At each level, the judiciary must give heed to legislatively-pronounced policies rather than pursuing independent social engineering. *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 827 (1978); *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 215 (1962). This is true whatever view the courts may take of congressional wisdom or the lack thereof in making those policy choices. *TVA v. Hill*, 437 U.S. 153, 194-95 (1978). As Justice Hugo Black reminded his colleagues, "The responsibility of this Court . . . is to construe and enforce the Constitution and the laws of the land as they are and not to legislate social policy on the basis of our personal inclinations." *Evans v. Abney*, 396 U.S. 435, 447 (1970). Nor will it do to suggest that the relationship between unions and management has been significantly altered in the six decades since passage of the NLRA as a justification of these results. Concerted activity remains as important today as it was then. *See Beth Israel Hospital*, 437 U.S. at 497-98 (in 1974, Congress extends NLRA to health care industry to remedy low wages and poor working conditions).

But even if the policies supporting a statute have become outmoded or no longer serve the public interest, the legislature, rather than the judiciary, must act to correct those flaws that have developed over time. As this Court has said: "[A] statute 'is not an empty vessel into which this Court is free to pour a vintage that we think better suits present-day tastes.' Considerations of this kind are for the Congress, not the courts." *National Broiler Mktg. Ass'n*, 436 U.S. 816, 827 (citations

omitted), (quoting *United States v. Sisson*, 399 U.S. 267, 297 (1970) and rejecting argument that agribusiness had so radically changed in the 55 years following enactment of the Capper-Volstead Act, the Court might disregard the legislative intent and language to expand the measure's coverage).

The Eighth Circuit's emphasis on "union direction" as synonymous with disloyalty ignores the congressional view of labor unions as institutions. The Act does not require that, in order to be protected, concerted activity be spontaneous or unplanned. As this Court has noted on more than one occasion, "organization rights are not viable in a vacuum"; their exercise depends both on the right of employees to discuss organization among themselves and the right of unions to discuss organization with employees. *Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. at 33 (unions are "essential to give laborers opportunity to deal on equality with their employer").

The Eighth Circuit contends that paid organizers may be poor employees given to sloth or disruptive conduct when they should be working. *Town & Country*, 34 F.3d at 629. There is, however, no body of evidence that suggests paid organizers as a class have any tendency to engage in wrongful conduct. *Town & Country*, 309 N.L.R.B. at 1257. Indeed, the paid organizer has tremendous incentive to perform his assigned tasks for the nonunion employer satisfactorily. To do otherwise not only subjects him to discharge, but will also earn him the disdain of the very workers he is trying to reach. Even the Fourth Circuit, in *H.B. Zachry*, conceded that the record evidence demonstrated that the work of the paid organizer there "was satisfactory, and

that he was proficient at his trade." 886 F.2d at 71. Other cases involving paid organizers contain similar findings. *See Oak Apparel*, 218 N.L.R.B. 701, 707 (1975); *Pilliod of Mississippi, Inc.*, 275 N.L.R.B. 799, 811 (1985). In this case, while Town & Country alleged Hansen was a poor worker and engaged in misconduct, the ALJ characterized this defense as "structured upon a composite of lies."[9] *Town & Country*, 309 N.L.R.B. at 1275.

Assuming, *arguendo*, that the Eighth Circuit's premise were sound, stripping paid organizers of all protection under the Act goes too far. A paid organizer is to be treated no differently than any other member of the company's work force; he may be terminated for poor job performance, just as anyone else might. While the organizer cannot be singled out for discriminatory treatment, he does not get "carte blanche in the workplace." *Town & Country*, 309 N.L.R.B. at 1257. *See also Sears, Roebuck & Co.*, 170 N.L.R.B. 533 (1968)(upholding discharge of paid organizer for failing to tend to his job duties); *Wellington Mfg. v. NLRB*, 330 F.2d 579, 586 (4th Cir.), *cert. denied*, 379 U.S. 882 (1964).

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[9]*Amicus* notes that the Eighth Circuit opinion attempts -- unfairly -- to suggest the opposite. In its decision, the lower court stated, "Hanson's crewmates complained to their foreman about Hanson's non-stop talking as well as his poor workmanship and low productivity." *Town & Country*, 34 F.3d at 627. The appellate court omits any reference to the ALJ's rejection of this claim in its narrative of the pertinent facts.

V. THE EIGHTH CIRCUIT INCORRECTLY APPLIES THE COMMON LAW GOVERNING MASTER-SERVANT RELATIONSHIPS

In its opinion, the Eighth Circuit cites the common law agency rules governing the relationship between master and servant as support for finding paid organizers unprotected. *Town & Country*, 34 F.3d at 628, 629. This effort is doubly misguided. There is no need to resort to the common law in construing the statutory definition of "employee" as it applies to paid organizers. And, even if there were, those principles fail to support the claim that paid organizers should not be considered statutory employees.

The Eighth Circuit incorrectly relies on *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. ___, 112 S. Ct. 1344 (1992) as a bridge to the common law of master-servant to define who may be an employee for purposes of the NLRA. Essentially, *Darden* counsels that when a statute fails to provide any useful definition of the term "employee," the courts should look, at least presumptively, to the common law for guidance. *Id.* at 1348. *See also Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). In *Darden*, the Court was called upon to determine the meaning of the term "employee" as used in the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1001, *et. seq.* ERISA provides a wholly circular and admittedly unenlightening definition: "The term 'employee' means any individual employed by an employer." 29 U.S.C. §1002(6).

The Eighth Circuit's characterization of the NLRA's definition of "employee" as "providing little help," *Town & Country*, 34 F.3d at 628, is clearly incorrect. In

contrast to ERISA, the NLRA offers a broad general definition of "employee," accompanied by a series of specific exceptions. In *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984), this Court had no difficulty in determining the status of illegal aliens under the Act, without resort to the common law. The *Sure-Tan* decision recognized that "the breadth of [the] definition is striking" and extends to all workers except those specifically enumerated as being excluded. 467 U.S. at 891. The Court concluded that illegal aliens were protected "employees," under §2(3), since they were not among the groups excepted. 467 U.S. at 891-92. Based on this rationale alone, paid organizers must be considered "employees" under the Act because they are not expressly excluded.

In short, the Court need not reach the *Darden* analysis in the instant case because Congress has clearly outlined who is an "employee" covered under the NLRA and who is not.[10]

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[10]In *Darden*, the Court notes that the definition of "employee" contained in the original Wagner Act was not particularly helpful in determining whether persons traditionally thought of as independent contractors should have been treated as statutory employees. Thus, in *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1944), the Court held newsboys to be covered employees, when under the common law they probably would have been independent contractors. Using a similar approach, the Court discounted common law rules in differentiating between independent contractors and covered "employees" under the Social Security Act. *United States v. Silk*, 331 U.S. 704 (1947). Congress responded to *Silk*, by amending the Social Security Act's definition of "employee" to explicitly include reference to the "usual common law rules" determining who should be an independent

Moreover, this Court has emphasized that special deference is to be accorded longstanding consistent interpretations of the Act by the NLRB. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401-02 (1983); *Bayside Enterprises, Inc. v. NLRB*, 429 U.S. 298 (1977). In this case the NLRB deliberately reconsidered its interpretation regarding paid organizers. After carefully reviewing the statutory language, legislative history and policy arguments, the NLRB reaffirmed its view that paid organizers fall within the ambit of §2(3). *Sunland Construction Co., Inc.*, 309 N.L.R.B. 1224, 1231-32 (1992) (Oviatt, M., concurring). The Eighth Circuit inappropriately rejected the Board's studied conclusion in favor of its own determination.

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contractor. *Darden*, 112 S. Ct. at 1349. In the Taft-Hartley amendments to the NLRA, Congress simply added the term "independent contractor" to the list of classes excluded from the definition of "employee." Therefore, *Darden* cannot be read to say that the present NLRA definition of employee is unhelpful in general or specifically with regard to the status of paid organizers. This is particularly true in light of the Court's decision in *Sure Tan*.

The common law, however, could be properly used to determine if a particular person or group falls within one of the exceptions as opposed to the general definition of "employee". *NLRB v. United Ins. Co.*, 390 U.S. 254, 256 (1968). For example, if an employer contends John Jones is an independent contractor and the agency contends he is an employee, the Board or the courts should look to the common law for guidance in resolving this question. Here, that inquiry is both unnecessary and irrelevant, since paid organizers are not among the excluded classes and *Town & Country* makes no claim that they do fall within an excluded class.

Even if common law agency or master-servant rules control, those principles do not support the *Town & Country* result. The common law recognized that one could be employed simultaneously by two "masters." The Restatement of Agency (2d), §226, states that "[a] person may be the servant of two masters" at the same time, so long as "the service to one does not involve abandonment of the service to the other." The courts and commentators support this principle. *Mazer v. Lipshutz*, 360 F.2d 275, 278 (3d Cir.) (citing "sound doctrine that a servant may have two masters at one time"), *cert. denied*, 385 U.S. 833 (1966); *Beaver v. Jacuzzi Brothers, Inc.*, 454 F.2d 284, 285 (8th Cir. 1972)("employee may be employed by more than one employer even while doing the same work"); W. Seavy, *Handbook of the Law of Agency*, (West, 1964), at p. 146. The Eighth Circuit concedes this to be true, but, citing comments to the Restatement, argues that ordinarily "the control a master can properly exercise over the conduct of a servant prevents simultaneous service for two independent employers." *Town & Country*, 34 F.3d at 628.

Contrary to the Eighth Circuit's suggestion, an organizer, paid or unpaid, does not, as a practical matter, engage in simultaneous service to two masters during the same working hours. During working hours, the organizer serves the interests of the employer by performing his or her assigned job duties. Organizing activities occur during non-working time--before or after work and lunch or break time. *See Republic Aviation v. NLRB*, 324 U.S. at 802 n. 8 (employer can prohibit solicitation during working hours). The organizer must, of necessity, adhere to this schedule, since failure to perform assigned duties can result

in discharge for cause. Hence, the organizer's dual employment is more akin to moonlighting, than the simultaneous service examples used in the Restatement.

The Eighth Circuit's analysis equates the advantages that accrue to the organizer as a result of his presence on the job site as a "service" to the union (and a concomitant disservice to the employer). An organizer's effectiveness will typically be enhanced by the opportunity to work side-by-side with the other employees whom he is trying to organize, since this makes it easier to become acquainted with them. Moreover, employees are more likely to give a pro-union message delivered by a fellow worker, as opposed to a stranger, a fair hearing. This is merely a by-product of the organizer's physical presence and not the result of some actual work performed for the union.

There simply is no conflict between performing work for a company and, during nonwork time, pursuing organizing activities among one's fellow employees. The only supposed conflict derives from the notion that organizing is antithetical to the best interests of the company and, hence, those who would engage in such activity must be disloyal. As previously noted, given that Congress has expressly found concerted activity to be in the public interest, this argument carries no weight.

That an employee receives some sort of payment from a union for engaging in organizing activities or applies for work at his union's request for the purpose of assisting in the union's organizing efforts does not change this analysis. Under either circumstance, the nature of the activity protected and the employer's ability to

protect against poor workmanship or malfeasance is the same as it would be if no payment or "union direction" were involved.[11] Indeed, as previously noted, even if the union "master" were to suggest the organizer leave the employer's service, this is no more than the organizer is legally entitled to do for any reason as an at-will employee. *See supra.*, pp. 11-12.

Accordingly, for all the reasons cited above, as well as in the principal briefs filed by the NLRB, the Boilermakers urge this Court to affirm the NLRB's interpretation finding paid organizers to be protected under the Act.

Respectfully submitted,

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[11]Here, the evidence is undisputed that all of the applicants were sincerely interested in and ready to accept employment with Town & Country. The Court does not have before it the case of an organizer, paid or unpaid, who has no intention of accepting employment if offered. *See Lipsey, Inc.*, 172 N.L.R.B. 1535 (1968).